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IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

No. 78-961

WARREN GAMBINO,

Petitioner,

versus

STATE OF LOUISIANA,

Respondent.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF LOUISIANA**

**RESPONSE OF STATE OF LOUISIANA,
RESPONDENT**

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RESPONSE OF STATE OF LOUISIANA,
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I.

RETROACTIVE APPLICATION

In his Petition For Certiorari relator contends that he is the victim of a "retroactive application" of the Louisiana Supreme Court's interpretation of the Louisiana obscenity statute, R.S. 14:106.

First, it is the State of Louisiana's position that this question cannot be inquired into by this Honorable Court on Petition For Certiorari because it was never argued in the Louisiana Supreme Court, and, more specifically, was not raised in petitioner's Application For Rehearing in that court, or in any other pleading filed in the Louisiana courts.

Alternatively, the argument lacks merit. In holding that four pictures in "National Screw" "give the appearance of the consummation of the ultimate sexual act of cunnilingus", the Louisiana Supreme Court was not giving a new interpretation to the Louisiana obscenity statute, but rather was concluding that the pictures in question, as a matter of fact, satisfied the test of "printed materials . . . showing actual ultimate sexual acts or simulated or animated ultimate sexual acts when there is an explicit, closeup depiction of human genital organs so as to give the appearance of the consummation of ultimate sexual acts" set out in R.S. 14:106 F (1).

2.

**R.S. 14:106 AS APPLIED IS NOT
VAGUE AND OVERBROAD**

The Louisiana obscenity law, R.S. 14:106, refers to actual or simulated ultimate sexual acts. This statute is largely based on this Court's opinion in *Miller v. California*, 413 U.S. 15 (1973), where, at 413 U.S., 25, the phrase "ultimate sexual acts, normal or perverted, actual or simulated" appears.

The State of Louisiana respectfully submits that there is nothing vague or overbroad in the Louisiana Supreme Court's holding in this case that the photographs in question "give the appearance of the consummation of the ultimate sexual act of cunnilingus." 362 So.2d, at 1110.

In order to enable this Court to determine the correctness of the Louisiana Supreme Court's decision herein the State of Louisiana has had the Louisiana Supreme Court Clerk's Office send to this Court, as part of the State of Louisiana's Response in this proceeding, a certified copy of the magazine "National Screw" which forms the basis of this prosecution.

3.

SPECIAL JURY CHARGES

No question concerning the trial court's refusal to give to the jury certain special charges requested by defense counsel was argued at any time in the Louisiana Supreme Court when this case was appealed to that court. The issue is not referred to in the brief to that court filed by either petitioner herein or the State of Louisiana, and is nowhere addressed in the opinion of the Louisiana Supreme Court in this proceeding. See *State v. Gambino*, 362 So.2d 1107 (La. 1978).

Under the settled jurisprudence of the Louisiana Supreme Court, matters not urged on appeal are waived. See, for example, *State v. Phillips*, 337 So.2d 1157 (La. 1976), and cases there cited.

Consequently, this issue cannot be urged in the Petition For Certiorari herein in the respectful opinion of the State of Louisiana.

4.

THE TRIAL JURY

On March 21, 1978, this Court handed down its decision in *Ballew v. Georgia*, 435 U.S. 223, declaring unconstitutional under the Sixth and Fourteenth Amendments to the United States Constitution the Georgia law permitting trial by a five-person jury, all of whom must concur in the verdict.

Although the trial in this case took place in November of 1977, prior to *Ballew*, the appeal herein was pending in the Louisiana Supreme Court on the date *Ballew* came down, having been lodged in that Court on March 7, 1978. However, petitioner did not raise this five out of six jury verdict question at any time in the Louisiana Supreme Court, advancing it for the first time in the Petition For Certiorari. Under these circumstances the State of Louisiana submits that the matter has been waived because not raised in the Louisiana courts.

Alternatively, the contention lacks merit. In this connection the State of Louisiana adopts here the argument set out in its brief to this Court in *Daniel Burch and Wrestle, Inc. v. Louisiana*, no. 78-90, which is scheduled for argument in this Court on February 21, 1979.

5.

THE "TAKEN AS A WHOLE" TEST

Petitioner contends that some of the articles in the July, 1977, issue of "National Screw" are not pornographic and deal seriously with topics of everyday interest to its readers, and that the Louisiana Supreme Court erred in holding that this fact was immaterial as far as a finding of obscenity was concerned because

"... that material has no rational relationship to that found by the jury, the trial judge and this Court to be hard-core sexual depictions. It is the offensive depiction of sexual conduct itself which must have 'serious literary, artistic, political or scientific value' to merit First Amendment protection. It has often been held that obscene material is not protected by the First Amendment. *Miller v. California*, supra. Placing prohibited obscene depictions in a magazine, book, or newspaper which contain other, unrelated articles or pictures of literary, etc., value, does not suffice to make obscenity legally acceptable. 'A quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication.' *Kois v. Wisconsin*, 408 U.S. 229, 92 S.Ct. 2245, 33 L.Ed.2d 312 (1972)." 362 So.2d, at 111-112.

In arguing that the foregoing is incorrect petitioner relies on *Penthouse Intern., Ltd. v. McAuliffe*, 454 F.Supp.

289 (N.D. Ga. 1978), which holds that segmented review of a book or magazine, when on balance the redeeming features of the work outweigh any of its arguably obscene portions, is erroneous.

The State of Louisiana believes that each obscenity case involving a magazine must be judged by its particular facts, and that "National Screw" is clearly not in the same category as "Playboy", "Penthouse", and "Oui". Moreover, a casual glance at "National Screw" for July, 1977, reveals that the latter magazine taken as a whole encourages a morbid, rather than a healthy, interest in sex, and that on balance the obscene portions far outweigh the remainder of this magazine. See July, 1977, issue of "National Screw" which has been sent to this Court in connection with this Response.

CONCLUSION

The State of Louisiana respectfully asks this Honorable Court to deny the Petition For Certiorari being sought herein.

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CERTIFICATE

I certify that three copies of this Response have been sent to:

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This ____ day of February, 1979.
